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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STAFF SERGEANT JOHN W. SUTTON, *PETITIONER,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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December 1995

56 PP

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Armed Forces erred when, in testing for harmless constitutional error, it quantitatively assessed the sufficiency of remaining lawful evidence to support Petitioner's convictions rather than qualitatively assessing the contributory impact on those convictions of hearsay statements admitted in violation of Petitioner's Sixth Amendment right to confrontation.

II. Whether the United States Court of Appeals for the Armed Forces erred when it failed to consider the contributory impact on Petitioner's sentence of hearsay statements admitted in violation of petitioner's Sixth Amendment right to confrontation.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO.

STAFF SERGEANT JOHN W. SUTTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Staff Sergeant John W. Sutton, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 13 September 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 42 M.J. 355

(1995), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review, issued on 21 December 1993, is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 13 September 1995. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provision: The Sixth Amendment of the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTORY (UNIFORM CODE OF MILITARY JUSTICE) PROVISIONS INVOLVED

UCMJ Article: Article 51(a) of the UCMJ states in pertinent part that—

> "Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot."

MANUAL FOR COURT-MARTIAL PROVISIONS INVOLVED

Military Rule of Evidence: Military Rule of Evidence 804(b)(3) provides in relevant part:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true."

Rule for Court-Martial: Rule for Courts-Martial 1001(a)(1) provides in pertinent part that—

> "After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence."

STATEMENT OF THE CASE

On 19-22 March 1991 a general court-martial composed of officer members tried Petitioner at Nellis AFB, Nevada. Contrary to his pleas, Petitioner was found guilty of charges alleging that while on temporary duty in Honduras, he and others, in violation of lawful general regulations, engaged in currency exchanges and misuse of their official positions as military postal clerks for personal pecuniary gain. (A summary of the charges and specifications on which Petitioner was arraigned, his pleas, and the findings of the court-martial are provided at Appendix C.) Following his conviction, Petitioner was sentenced to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to airman basic (E-1) and payment of a fine of $84,742.00 (or confinement for an additional 5 years until such fine was paid).

As part of its case-in-chief (apparently in support of specification 4 of Charge II and specifications 1-4 of Charge III), the Government moved for admission of two type-written statements (Pros. Exs. 1 and 2, respectively) purportedly executed by a Mr. Glenn Bergendahl. R. 23. The substance of these statements referenced Petitioner's conversion of local currency into U.S. money orders for Mr. Bergendahl, along with Mr. Bergendahl's unlawful receipt of packages through the military postal system by having them addressed to Petitioner and utilizing an address purportedly provided by Petitioner. Pros. Exs. 1 and 2. The statements also detailed Mr. Bergendahl's involvement with local Honduran authorities and his movements from Honduras to Nicaragua to Panama in the time-frame immediately preceding his execution of the statements. *Id.* Throughout their substance, Mr. Bergendahl's statements referred to Petitioner as the one having conceived of and initiated the transactions in question. *Id.*

In anticipation of defense objection to the hearsay nature of these statements, the Government relied upon Mil. R.

Evid. 804(b)(3) as a basis for their admission, claiming that Mr. Bergendahl was unavailable to testify and the statements represented statements against Mr. Bergendahl's penal interest. R. 24; App. Ex. II. The Government further opined that the statements would not violate Petitioner's Sixth Amendment confrontation rights because they were reliable and would be corroborated by most other evidence in the case and additionally by a prior statement of the accused. R. 24; App. Ex. II.

In response to the Government claims of unavailability, defense counsel argued that the Government had made no good faith efforts to procure Mr. Bergendahl's testimony, R. 26; specifically, that the Government had made no effort to depose Mr. Bergendahl. R. 25, 29. With regard to the Government's claims of Sixth Amendment propriety, defense counsel argued that the statements lacked any indicia of reliability.

Ultimately, the military judge overruled the defense objections to Pros. Exs. 1 and 2, R. 69-70, and they were presented to the members. R. 288-289. Trial counsel made repeated reference to the statements during his findings argument. R. 376, 377, 378, 381, 382, 383. He even explained how the statements had served as a basis for the Government's drafting of charges against Petitioner:

> "Now, if you also look closely at Mr. Bergendahl's statements you will see that he was not paying him the $25.00 a package during the first TDY. And that's why the government withdrew the last few lines of that Specification that he was being paid the 50 Lempira per package."

Too, trial counsel referred to the statements, both implicitly and explicitly during his argument on sentencing. Implicitly, he seized upon the statements' characterization of Appellant as the one having conceived of and

initiated the events at issue: trial counsel several times referenced the "Sutton plan", R. 463, 473, and how, "He [Petitioner] was the mastermind of that, he was the inventor of that." R. 463. Trial counsel explicitly referred to the hearsay statements, telling the members—

> "And if you look at the Bergendahl [statement], towards the end of that eight page statement, you can see the high-level interest concern and turmoil that this whole operation caused when it was finally shut-down in August of 89, the plan that this accused started. You can see directly in that statement the kind of interest that these crimes attracted in Honduras."

R. 465.

The ruling of the military judge admitting Mr. Bergendahl's statements was affirmed the Air Force Court of Military Review. The U.S. Court of Appeals for the Armed Forces subsequently granted review to address:

I

> WHETHER THE MILITARY JUDGE ERRED BY RULING THAT MR. BERGENDAHL WAS UNAVAILABLE WITHOUT REQUIRING THE GOVERNMENT TO SHOW AN ATTEMPT TO OBTAIN MR. BERGENDAHL'S TESTIMONY BY DEPOSITION

II

> WHETHER STATEMENTS, WHICH ACKNOWLEDGE THE DECLARANT'S OWN CRIMINAL LIABILITY BUT WHICH

MADE THE APPELLANT SEEM MORE CULPABLE, MADE WHILE THE DECLARANT WAS BEYOND THE REACH OF THE HONDURAN GOVERNMENT QUALIFY AS STATEMENTS AGAINST INTEREST

III

WHETHER THE ADMISSION OF STATEMENTS OF MR. BERGENDAHL VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION SINCE THEY DID NOT MEET THE REQUIREMENTS OF *Idaho v. Wright* [, 497 U.S. 805 (1990)]

After a statement of the case and facts, the Court's majority concluded that it need not resolve the admissibility of Mr. Bergendahl's statements because any error regarding their admissibility as to the offenses was harmless. 42 M.J. at 357. Citing to *Arizona v. Fulminante,* 499 U.S. 279 (1991), the majority opined that the other testimonial and documentary evidence offered against Petitioner "compellingly establish appellant's guilt beyond a reasonable doubt as to each of those offenses." 42 M.J. at 357.

In a concurring opinion, the late Judge Wiss concluded that Mr. Bergendahl's statements failed "muster as trustworthy under Mil. R. Evid. 804(b)(3)." He further noted that—

> "Normally, admission of such evidence, in violation of the rules of evidence and, likely the Sixth Amendment right of confrontation, would compel reversal. Indeed, I confess

that my decision to concur in the majority's conclusion of no prejudice is with some reservation. In the end, however, I believe the majority correctly decides that the other evidence against appellant is so compelling that, beyond a reasonable doubt, Bergendahl's statements did not prejudice the members' findings."

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN, IN TESTING FOR HARMLESS CONSTITUTIONAL ERROR, IT QUANTITATIVELY ASSESSED THE SUFFICIENCY OF THE "OTHER EVIDENCE" TO SUPPORT PETITIONER'S CONVICTIONS RATHER THAN QUALITATIVELY ASSESSING THE HEARSAY STATEMENTS' CONTRIBUTORY IMPACT ON THOSE CONVICTIONS

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Honorable Court stated the harmless error test to be whether the State has met its burden of demonstrating that admission of the unlawful evidence did not contribute to the conviction. *See* 499 U.S. at ___, 111 S.Ct. at 1257. Therein, this Court also expressly acknowledged rejection of "a much more lenient rule" which would allow affirmance of a conviction if the evidence other than that which should not have been admitted was sufficient to sustain the verdict. 499 U.S. at ___, 111 S.Ct. at 1264.

In the instant case it is clear that the Court of Appeals for the Armed Forces erroneously applied the rejected

"more lenient rule," finding that the other testimonial and documentary evidence admitted against Petitioner "compellingly establish appellant's guilt beyond a reasonable doubt . . . " In limiting its review to a quantitative assessment of evidentiary sufficiency, the Court of Appeals for the Armed Forces failed to conduct the more stringent and *required* qualitative assessment as to whether the Government had demonstrated that admission of Mr. Bergendahl's statements did not contribute to Petitioner's convictions.

Petitioner submits that the record, on its face, affirmatively demonstrates connectivity between Mr. Bergendahl's statements and Petitioner's convictions. The Government's documentary exhibits against Petitioner consume more than one volume of the record. See Volumes III and IV. The documents that lead off this stack of prosecutorial exhibits, the first to be seen and presumably reviewed by the members during their deliberations are Mr. Bergendahl's statements, Pros. Exs. *1 and 2,* First and Second.

As reflected in trial counsel's initial proffer of the statements' reliability, they were there to be corroborated by the other evidence—as Petitioner asserts, they were the heart of the Government's case, the basis for Government drafting of at least some of the charges and the trellis upon which the members were repeatedly encouraged to train the other evidence. Having asked the members to rely upon Mr. Bergendahl's statements as a trustworthy basis upon which to premise Petitioner's convictions, the Government has not, indeed cannot, now show that these same statements did not contribute to Petitioner's convictions.

Unfortunately, the U.S. Court of Appeals for the Armed Forces did not analyze the case from this, the proper, perspective. In utilizing the expressly rejected "more lenient rule" and ascertaining only whether the other, lawful evidence of the case was sufficient to sustain the Petitioner's convictions, the Court of Appeals failed, to the

substantial prejudice of Appellant, to measure his case against proper Constitutional standards.

II. THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FAILED TO CONSIDER THE CONTRIBUTORY IMPACT ON PETITIONER'S SENTENCE OF HEARSAY STATEMENTS ADMITTED IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

In stating that any error regarding the admissibility of Mr. Bergendahl's statements was harmless error, the U.S. Court of Appeals limited its finding of harmlessness "to the offenses" and cited to the case of *Arizona v. Fulminante* 499 U.S. 279 (1991). *See* 42 M.J. 355. While *Arizona v. Fulminante,* dealt only with how a coerced confession may have potentially impacted upon a finding of guilty, the more seminal case on constitutional harmless error testing, *Chapman v. California,* 386 U.S. 18 (1967), indicates that the test for harmless error applies not only to the findings phase of a trial but to all phases: ". . . before a federal constitutional error can be held harmless, the court must be able to declare belief that it was harmless beyond a reasonable doubt." *Id.* at 20. *Chapman* says nothing about limiting the test for harmlessness to some partial phase of trial encompassing less than the totality of the proceedings.

In military courts-martial, members not only act as the factfinding body, but they also hear evidence on and adjudge the sentence in the case. *See* Article 51(a), Uniform Code of Military Justice. Typically, the sentencing phase occurs immediately following the announcement of findings, *see* Rule for Courts-Martial 1001(a)(1),

Manual for Courts-Martial, United States (1995 edition), and the members, unless specifically instructed otherwise, are permitted to consider for sentencing purposes all the evidence with which they were previously provided for findings. Hence, in the instant case, Mr. Bergendahl's statements were before the members not only on findings, but during the sentencing phase of the trial as well.

Trial counsel made use of that fact as indicated by both his implicit and explicit references to them during sentencing argument. Preying upon Mr. Bergendahl's predilection for blameshifting, see *Williamson v. United States*, ___ U.S. ___, ___, 114 S.Ct. 2431, 2437 (1994) (O'Conner, J.) (''Small fish in a big conspiracy often get shorter sentences than people who are running the whole show [citations omitted]''), trial counsel implicitly utilized Mr. Bergendahl's statements to argue that Petitioner was deserving of a harsher sentence than what he might otherwise receive because he was a ''big fish,'' a mastermind and ringleader who ran the show that was the ''Sutton plan.''

Petitioner's sentence (including a dishonorable discharge, 3 years confinement, and an $84,000 fine) speaks to trial counsel's successful utilization of the ''big fish'' argument. Petitioner submits that there is simply no way, particularly given trial counsel's implicit and explicit argument of them, that Mr. Bergendahl's hearsay statements did not contribute to the sentence which he (Petitioner) received. The Court of Appeals, however, completely failed to address in any way the impact of Mr. Bergendahl's statements upon Petitioner's sentence. They simply did not conduct a complete analysis of harmless error with regard to Petitioner's case.

CONCLUSION

On its face, the constitutional harmless error test, as established and discussed by this Honorable Court in

Chapman v. California, 386 U.S. 18 (1967) and *Arizona v. Fulminante*, 499 U.S. 279 (1991), is one of ready apprehension and simple application. In the instant case, however, the Court of Appeals for the Armed Forces has demonstrated both an apparent misunderstanding and misapplication of the test. They failed to apply the test to the entirety of the trial proceedings (including the sentencing phase) and when they did apply the test to the findings phase, they utilized the wrong standard of measurement. They did not seek to assess the hearsay statements' contributory impact upon findings; indeed, neglecting to even consider them, they looked only to the remaining "other evidence" to determine whether there was a quantitative sufficiency of the evidence.

The Court of Appeals for the Armed Forces sits to ensure civilian oversight of military courts-martial. Such oversight is without meaning where the Court fails to comprehend and properly apply the Law of the Land.

WHEREFORE, Petitioner respectfully requests this Honorable Court to issue a writ of certiorari to the U.S. Court of Appeals for the Armed Forces.

Respectfully submitted,

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December 1995

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE

v.

JOHN W. SUTTON, JR., STAFF SERGEANT
U.S. AIR FORCE, APPELLANT.

No. 94-0400.
CMR No. 29318.

U.S. Court of Appeals for the Armed Forces.

Argued May 17, 1995.

Decided Sept. 13, 1995.

Accused was convicted by general court-martial, William C. Thompson, Jr., J., of wrongfully exchanging and possessing without authority United States currency, wrongfully using Armed Forces Postal (APO) system, conspiring to possess currency wrongfully, receiving thing of value for delivering official matter through APO system, and soliciting service member to receive packages for commercial vendor and using government vehicle to deliver packages. The United States Air Force Court of Military Review affirmed, 1993 WL 541345. Review was granted. The United States Court of Appeals for the Armed Forces, Crawford, J., held that any error regarding admissibility of witness' statement about accused's offenses under hearsay exception for declarations against

interest by unavailable declarant was harmless, in light of evidence which compellingly established accused's guilt.

Affirmed.

Wiss, J., filed a concurring opinion.

For Appellant: *Captain Todi S. Cranes* (argued); *Colonel Jay L. Cohen* (on brief); *Captain Gilbert J. Andia, Jr.*

For Appellee: *Captain Timothy G. Buxton* (argued); *Colonel Thomas E. Schlegel* and *Colonel Jeffery T. Infelise* (on brief).

Opinion of the Court

CRAWFORD, Judge:

1. Contrary to his pleas, appellant was convicted of the following:

(a) violating a lawful general regulation by wrongfully exchanging and possessing without authority U.S. currency between October 9, 1988, and February 5, 1989;

(b) violating a general regulation by wrongfully using the U.S. military Postal System to receive packages for Mr. Glenn Bergendahl between October 9, 1988, and February 5, 1989;

(c) three specifications of conspiracy with three separate servicemembers between October 9, 1988, and February 5, 1989, to wrongfully exchange U.S. currency at other than an authorized currency exchange point; and a fourth specification of conspiracy with a fourth member during the same time to wrongfully possess U.S. currency;

(d) receiving a thing of value for delivering official matter through the Armed Forces Postal (APO) system to Mr. Bergendahl between March 23, 1987, and July 9, 1987;

(e) receiving $25.00 for delivering official matter through the APO system to Mr. Bergendahl between October 9, 1988, and February 5, 1989;

(f) soliciting Staff Sergeant Steele to receive packages for Mr. Bergendahl through the APO mailing system and using a government vehicle to deliver such packages to Mr. Bergendahl.

2. These offenses are in violation of Articles 92, 81, and 134, Uniform Code of Military Justice, 10 USC §§ 892, 881, and 934, respectively. The trial was at Nellis AFB, Nevada, on March 19-22, 1991. The convening authority approved the sentence of a dishonorable discharge, 3 years' confinement, total forfeitures, reduction to the lowest enlisted grade, and a fine of $84,742 (or to be confined for an additional 5 years until such fine is paid). The Court of Military Review* affirmed the findings and sentence in a

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See 41 MJ 213, 229 n. * (1994).

fifteen-page unpublished opinion, 1993 WL 541345. We granted appellant's petition on the following issues:

I (modified)

WHETHER THE MILITARY JUDGE ERRED BY RULING THAT MR. BERGENDAHL WAS UNAVAILABLE WITHOUT REQUIRING THE GOVERNMENT TO SHOW AN ATTEMPT TO OBTAIN MR. BERGENDAHL'S TESTIMONY BY DEPOSITION.

II

WHETHER STATEMENTS, WHICH ACKNOWLEDGE THE DECLARANT'S OWN CRIMINAL LIABILITY BUT WHICH MADE APPELLANT SEEM MORE CULPABLE, MADE WHILE THE DECLARANT WAS BEYOND THE REACH OF THE HONDURAN GOVERNMENT QUALIFY AS STATEMENTS AGAINST INTEREST.

III

WHETHER ADMISSION OF STATEMENTS OF MR. BERGENDAHL VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION SINCE THEY DID NOT MEET THE REQUIREMENTS OF *IDAHO V. WRIGHT*.

FACTS

3. Appellant was on temporary duty in Honduras and discovered a better exchange rate for his dollars at unauthorized exchange points on the local economy. He developed a scheme whereby he converted his dollars into

local currency, then took the local currency to the base and turned it into U.S. dollar money orders. He also became involved in a second scam in which he allowed a commercial vendor, Mr. Bergendahl, to receive packages through the Armed Forces Postal system. Mr. Bergendahl was a Norwegian businessman operating in Honduras. Mr. Bergendahl's statements concerning appellant's various schemes were admitted into evidence at trial under Mil.R.Evid. 804(b)(3), Manual for Courts-Martial, United States, 1984, following a determination that he was unavailable due to Honduran travel restrictions because he was still appealing his conviction of criminal charges in Honduras. Appellant now argues that Mil.R.Evid. 804(b)(3), like its Federal counterpart, should require that there be an attempted deposition prior to declaring a witness unavailable in the United States. Final Brief at 13. The record indicates that the Government did attempt to talk to Mr. Bergendahl about a deposition but he refused to make a statement in Honduras while his appeal of his conviction of the charges against him was pending. There was no evidence in the record that the United States would find it impractical to return the court-martial to Honduras, the site of the crime as well as of the location of Bergendahl. RCM 906(b)(11), Manual, *supra,* authorizes a change of venue, but no such motion was made.

Discussion

4. For Mr. Bergendahl's statements to be admissible under Mil.R.Evid. 804(b)(3), the declarant must be (1) unavailable, and (2) the statement must be against the declarant's penal interest, that is, such "that a reasonable person . . . would not have made the statement unless" he or she "believed it to be true."

5. As to a declaration against penal interest, *Williamson v. United States,* ___ U.S. ___, 114 S.Ct. 2431, 129

L.Ed.2d 476 (1994), has limited Fed.R.Evid. 804(b)(3) to those portions of a narrative that actually inculpate the declarant. Statements that are not self-inculpatory are not covered.

6. Nevertheless, we need not resolve admissibility of Mr. Bergendahl's statements. Instead, we hold that any error regarding admissibility of Mr. Bergendahl's statement as to the offenses was harmless. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Art. 59(a), UCMJ, 10 USC § 859(a). All four soldiers who conspired with appellant to commit the offenses testified at trial as to their conduct, appellant's conduct, and statements by appellant concerning the conduct. This testimony, together with other testimony and documentary evidence (pros. ex. 9, 11, 18), compellingly establish appellant's guilt beyond a reasonable doubt as to each of those offenses.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and GIERKE concur.

WISS, Judge (concurring):

7. I conclude that the military judge erred by admitting the out-of-court statements of Bergendahl into evidence: First, the Government had not pursued "every reasonable means" (¶ 11) to obtain his testimony—specifically, by way of deposition; second, in any event, his statements, in the circumstances under which they were made, were not against his penal interest.

I

8. Mil.R.Evid. 804(a)(5), Manual for Courts-Martial,

United States, 1984, stipulates that, before a witness is "unavailable" for purposes of admission of certain hearsay statements, including a statement against interest under Mil.R.Evid. 804(b)(3), the proponent of the declarant's statement must show that it "has been unable to procure . . . the declarant's attendance or testimony by process or other reasonable means. . . ." The legislative history of the identical federal rule makes clear the drafters intent that this includes at least an effort to depose the declarant. *See* J. Weinstein & M. Berger, 4 *Weinstein's Evidence,* Initial Congressional Changes at 804-8 and 804-10 and para. 804(a)[01] at 804-57 (1995).

9. The Drafters' Analysis of Mil.R.Evid. 804(a)(5) reflects that the rule is "taken from the Federal Rule without change," except as to a different subsection from the one relevant here. Manual, *supra* at A22-51 (Change 2). In the absence of any indication that the drafters' intent was, nonetheless, for a different meaning and application, the same requirement should be ascribed to the military rule as to the federal rule. *See United States v. Powell,* 22 MJ 141, 143 (CMA 1986); S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* (hereafter Saltzburg) 843 (3d ed. 1991).

10. Trial counsel's written brief in support of admissibility of Bergendahl's out-of-court statements refers to the efforts to obtain his live appearance (he was under travel restrictions in Honduras pending completion of his appeal of his conviction there) but made no mention of any effort to obtain his testimony by deposition. Appellate Exhibit II at 1. Responding to a defense objection in this connection and the military judge's inquiry as to whether any steps had been taken to obtain a deposition, trial counsel represented that Bergendahl had orally told counsel "that he would not be willing to make any statements within" Honduras because it might "affect his case" there. The military judge's ruling that the witness was

unavailable under Mil.R.Evid. 804(a) addressed the Government's efforts to secure Bergendahl's attendance at trial but did not mention the adequacy of its effort to secure Bergendahl's testimony via deposition.

11. This Court has stated "that a witness is not 'unavailable'" for hearsay-evidence purposes unless the proponent "has exhausted every reasonable means to secure" the witness' testimony. *United States v. Burns,* 27 MJ 92, 97 (1988). Usually, a mere refusal of a witness to cooperate fails this standard. *Cf. United States v. Ortiz,* 35 MJ 391 (CMA 1992); *United States v. Ferdinand,* 29 MJ 164 (CMA 1989), *cert. denied,* 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990); *United States v. Cokeley,* 22 MJ 225 (CMA 1986).

12. I recognize that a judicial order to Bergendahl to submit to a deposition would not have been enforceable in Honduras, *cf. United States v. Hampton,* 33 MJ 21 (CMA 1991). While the consequences of such an order are uncertain, I cannot say on this bare record that a deposition order would have been futile. *Cf. United States v. Rousseau,* 25 MJ 188 (CMA 1987) (summary disposition) (Everett, C.J., concurred in the result, noting that a judicial "order might have carried some weight with the witness merely by reason of the judge's position"). Moreover, there is no basis in this record for knowing what effect, if any, a judicial order would have had on the willingness of Honduran officials to cooperate in some manner so that Bergendahl's deposition could have been secured. The effort simply never was made.

13. Accordingly, I believe that, on this record that the court below found "barely enough," unpub. op. at 7, the military judge abused his discretion in finding Bergendahl "unavailable" for purposes of Mil.R.Evid. 804(a) without first issuing an order to Bergendahl to submit to a deposition.

II

14. Of course, even if Bergendahl was unavailable, admission of his out-of-court statements depends upon their justifiably being characterized as against his interest. *See* Mil.R.Evid. 804(b)(3). These statements fail this test.

15. To qualify under this hearsay exception, the relevant statement, "at the time of its making," must have "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true." Mil.R.Evid. 804(b)(3). Since these conditions are intended to guarantee trustworthiness of the statement, "it is important to determine whether a person would have thought the statement was against interest *when made*. . . ." Saltzburg, *supra* at 847 (emphasis added). Unfortunately, I believe that the conclusion is ineluctable that Bergendahl, in fact, believed that he had everything to gain by making these statements in cooperation with United States investigative agents.

16. Bergendahl was in Norway when an employee in Honduras informed him of business problems and inquiries by customs officials. Immediately, he returned to Honduras and, upon advice of counsel, began close cooperation with Honduran officials. Pros.Ex. 2 at 6. His statement of August 15, 1989, indicates that he cooperated with those officials because he repeatedly was told that, in exchange for that cooperation, his business would not be disrupted and "no criminal action" would be taken against him. Pros.Ex. 2 at 7.

17. Later, press interest in this matter increased, and Bergendahl was told that Honduran officials were looking for him and were prepared to apprehend him. In response, he fled to Nicaragua, from whence he communicated to Honduran officials that he would not return without a written guarantee of no prosecution. Pros.Ex. 2 at 7-8.

18. In this context, he phoned an agent of the United States Government from Nicaragua to offer his cooperation in an investigation by the United States. He agreed to cooperate, stating that he had "lost my trust in the word of" local Honduran officials. Bergendahl then traveled to Howard Air Force Base in Panama, pros.ex. 2 at 8, where he made the two sworn statements in issue at appellant's trial. Those statements not only implicated Bergendahl but, as well, implicated appellant and others and sought to minimize and rationalize Bergendahl's role. *But see Williamson v. United States,* ___ U.S. ___, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) (only statements that are truly inculpatory are covered by Fed.R.Evid. 804(b)(3)).

19. In sum, then, Bergendahl made the statements while in Panama and not subject to Honduran jurisdiction. Further, he did so at a time in which he had affirmatively conditioned his return to Honduras on a guarantee of non-prosecution and while he affirmatively was pursuing such a promise. Thus, his statements to U.S. agents may have been motivated by a wish to curry favor in this regard, or they simply may have been the product of a belief that, in any event, they would not be used against him in any Honduran prosecution. Either way, they fail muster as trustworthy under Mil.R.Evid. 804(b)(3).

III

20. Normally, admission of such evidence, in violation of the rules of evidence and, likely, the Sixth Amendment right of confrontation, would compel reversal. Indeed, I confess that my decision to concur in the majority's conclusion of no prejudice is with some reservation. In the end, however, I believe the majority correctly decides that the other evidence against appellant is so compelling that, beyond a reasonable doubt, Bergendahl's statements did not prejudice the members' findings.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Staff Sergeant JOHN W. SUTTON, JR., FR424-82-6675
UNITED STATES AIR FORCE

ACM 29318

21 DECEMBER 1993

Sentence adjudged 22 March 1991 by GCM convened at Nellis Air Force Base, Nevada. Military Judge:
William C. Thompson, Jr.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, a fine of $84,742, to be confined until fine is paid (not more than 5 years in addition to the years before adjudged), and reduction to E-1.

Appellate Counsel for the Appellant: Major Marilyn A. Gordon (argued), Colonel Jeffrey R. Owens, Lieutenant Colonel Jay L. Cohen, Major Alice M. Kottmyer, and Captain Gilbert J. Andia, Jr.

Appellate Counsel for the United States: Captain David C. Wesley (argued), Colonel Jeffery T. Infelise, Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., Captain James C. Sinwell, and Captain Timothy G. Buxon.

Before

LEONARD, JAMES, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

JAMES, Senior Judge:

This case requires a tortuous examination of the admissibility of statements against penal interest and their constitutional consequences. Staff Sergeant Sutton was convicted of various offenses which we describe below, all related to prohibited currency exchanges or misuse of government resources. He now raises the hearsay point to which we referred and assigns numerous other errors, but none warrant relief. First we summarize the facts, and then we turn to the assignments.

I. Facts

Sergeant Sutton was twice sent to Honduras on temporary assignments in the postal services center at an American outpost. Local regulations prohibited possession of American currency and required that it be surrendered and exchanged at a specified exchange rate. Sergeant Sutton used his position to evade those prohibitions, profiting on his many exchanges of dollars for local currency and returning his profits to the United States through the postal money orders sold in his postal service center. He also used his military position, the military postal system, and military vehicles to serve a civilian businessman in Honduras. The civilian rented video tapes and sold related equipment. Sergeant Sutton received commercial mail in his own name but containing things ordered by the civilian businessman and destined for the

civilian's business, not a permissible use of the military postal system.

The foregoing misconduct resulted in several charges and specifications which were tried by a general court-martial. The principal witnesses against Sergeant Sutton were coworkers in the postal service center who had benefitted from the prohibited money exchanges, seen them, and helped deliver the mailed parcels to the civilian businessman. Also introduced were scores of money orders bought by Sergeant Sutton and two detailed statements given by the civilian businessman. Sergeant Sutton was convicted of:

> Four conspiracies[1] to exchange money with Ellis, Wedley, English, and Steele (each separately pleaded and shown to have been separate);
>
> Disobedience of the currency exchange regulation's prohibition[2] against possessing American currency;
>
> Disobedience of an Air Force regulation[3] by misusing the postal system and a government vehicle;
>
> Graft[4] by taking money in exchange for his official duty; and
>
> Soliciting Steele[5] to violate the same Air Force regulation in the same way.

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[1]Article 81, UCMJ, 10 U.S.C. § 881 (1988); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (hereafter "MCM"), Part IV, paragraph 5.

[2]Article 92, UCMJ, 10 U.S.C. § 892 (1988); MCM, Part IV, paragraph 16; United States Southern Command Regulation 1-20, *Currency Control—Honduras*, paragraph 3. a. e. f. and g (6 January 1986).

[3]Article 92, UCMJ, 10 U.S.C. § 892 (1988); MCM, Part IV, paragraph 16; Air Force Regulation 30-30, *Standards of Conduct*, paragraph 7 (21 June 1983).

[4]Article 134, UCMJ, 10 U.S.C. § 934 (1988); MCM, Part IV, paragraph 66.

[5]Article 134, UCMJ, 10 U.S.C. § 934 (1988); MCM, Part IV, paragraph 105; A.F.R. 30-30, paragraph 7.

Sergeant Sutton's principal complaint is that the military judge admitted hearsay statements by the civilian on the theory that they were statements against penal interest.

II. Statement Against Penal Interest

Among the evidence introduced against Sergeant Sutton were two detailed written statements given by the businessman to American investigators. They were offered by the prosecution on the theory that they were statements against penal interest, *see* Mil.R.Evid. 804(b)(3), and the military judge overruled the defense hearsay objections on that ground. Furthermore, the defense objection at trial was stated both on the hearsay ground and on the ground that admission of the statements denied Sergeant Sutton his Sixth Amendment right to confrontation of the absent declarant. Both issues are preserved for appellate review, and we must now address them.

We must address several aspects of this problem to resolve the issue. First, we must determine whether the prosecution satisfied its burden of showing that the witness was not available, for all the hearsay exceptions under rule 804 depend on unavailability. Unraveling the unavailability issue will require us to address the information on which a military judge may make such a "preliminary finding" under Mil.R.Evid. 104(a). Then we must address compliance with rule 804(b)(3). We must also decide the constitutional issue, and we must determine whether the two statements were adequately authenticated. As we wind our way through this assignment, we mention authority under the federal civilian counterparts of our rules of evidence because the military rules are identical. *See generally United States v. Dillon,* 18 M.J. 340, 344 n.3 (C.M.A. 1984).

A. Unavailability

The exceptions to the hearsay rule under Mil.R.Evid.

804(a) depend on unavailability of the declarant, and rule 804(a)(5) imposes a two-part test: The witness is actually absent, and the proponent of the evidence "has been unable to procure the declarant's attendance . . . by process or other reasonable means." The prosecution in Sergeant Sutton's case relied heavily on representations of counsel during a motions session to satisfy this requirement. The trial counsel represented that the businessman-declarant was "under a travel restriction" imposed by the Honduran authorities after having been convicted himself and that the Honduran government had refused to make the businessman available for Sutton's trial. Trial counsel corroborated his representations with correspondence showing the inquiries made into the civilian's availability and their lack of success. This aspect of the issue requires that we address both the substantive issue (unavailability) and the procedure used. We turn first to trial counsel's shorthand approach to proof of unavailability to determine whether the military judge had before him information on which it was permissible to decide the issue.

Mil.R.Evid. 104(a) and (c) give the military judge authority to decide such issues alone, including "the availability of a witness," in a motions session. Rule 104(a) provides, "In making these determinations, the military judge is not bound by the rules of evidence except those with respect to privileges." It is true, as Sergeant Sutton urges, that averments of counsel are not evidence. *United States v. Clifton,* 15 M.J. 26, 29 (C.M.A. 1983); *United States v. Daffron,* 32 M.J. 912, 916 n.6 (A.F.C.M.R. 1991), *pet. denied,* 34 M.J. 75 (C.M.A. 1991); *United States v. Watson,* 14 M.J. 593, 594 (A.F.C.M.R. 1982), *pet. denied,* 15 M.J. 64 (C.M.A. 1982); *United States v. Barbeau,* 9 M.J. 569, 571-72 (A.F.C.M.R. 1980), *pet. denied,* 9 M.J. 277 (C.M.A. 1980); *United States v. Sanders,* 31 M.J. 834, 837 (N.M.C.M.R. 1990); *see also Vanover v. Clark,* 27 M.J. 345, 348 (C.M.A. 1988); *United*

States v. Facey, 26 M.J. 421, 425 (C.M.A. 1988). However, the flexibility provided by Mil.R.Evid. 104(a) is explicitly extended to the issue of availability, suggesting to us that conventional *evidence* is not required. *See United States v. Burrow*, 16 U.S.C.M.A. 94, 36 C.M.R. 250, 254-55 (1966) (unsworn and uncontested representations of trial counsel sufficient); *United States v. Casamento*, 887 F.2d 1141, 1169 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990) (declarant's unavailability sufficiently shown by affidavit of an assistant United States attorney); *United States v. Losado*, 674 F.2d 167, 172 (2d Cir. 1982), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982) (''properly accepted the government's representations''); *Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385, 1389-90 (5th Cir. 1980), *cert. denied*, 449 U.S. 836, 101 S.Ct. 109, 66 L.Ed.2d 42 (1980) (within judge's discretion in civil case to rely upon counsel's representations to establish unavailability; opponent must show error); *Creamer v. General Teamster Local Union* 326, 560 F. Supp. 495, 499 (D. Dela. 1983) (court relied upon affidavit by proponent's counsel in civil case); *but see United States v. Kehm*, 799 F.2d 354, 359 (7th Cir. 1986). Thus, while it is inelegant to rely upon representations of counsel to establish such an important predicate, it is not

error, especially where, as here, there is no real dispute about the facts so shown.[6]

Now we turn to the adequacy of the prosecution's efforts to procure the businessman's attendance at trial. The Confrontation Clause states an emphatic preference for production of the witness to avoid "trial by affidavit," *e.g., Dutton v. Evans,* 400 U.S. 74, 94-95, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring). *See generally Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2061-63, 90 L.Ed.2d 514 (1986). However, the Confrontation Clause has consistently been interpreted to allow for some exceptions, especially those which rely upon unavailability. In those instances, the constitutional requirement is that the prosecuting proponent show good faith efforts to obtain the personal appearance of the witness-declarant. *E.g., Idaho v. Wright,* 497 U.S. 805, ___, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638, ___ (1990) (child's statement to attending pediatrician admitted under Fed.R.Evid. 803(24)); *Ohio v. Roberts,* 448 U.S. 56, 100A S.Ct. 2531, 2543, 65 L.Ed.2d 597 (1980) (witness's testimony at preliminary hearing admitted in rebuttal at trial); *United States v. Wind,* 28 M.J. 381, 383 (C.M.A. 1989) (statement of deserter against penal interest); *United States v. Hubbard,* 28 M.J. 27, 31-32 (C.M.A. 1989), *cert. denied,* 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 101 (1989) (former testimony admissible

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[6]*See United States v. Cordero,* 22 M.J. 216, 220 n3 (C.M.A. 1986). We emphasize that we do not encourage this practice. Reliance upon representations streamlines subjects on which more detail is usually needed. Indeed, much more detail would have been much better in this case, which includes barely enough. Reliance on the lawyer's representations also puts the lawyer's credibility on the line, *see* ABA Model Rules of Professional Conduct, rule 3.7 (Lawyer as Witness) (1983); Air Force Rules of Professional Conduct, rule 3.7 (Lawyer as Witness) (October 22, 1992), and it gives the advocates a seductive but false sense that they are licensed to produce and weave representations into their arguments on a motion or objection, stringing out the exchanges indefinitely as each side replies in kind. This is no way to practice law, and, more importantly, it is not a good way to decide motions and objections.

when "unavailability clearly established"); *United States v. Cordero,* 22 M.J. 216, 220 (C.M.A. 1986) (standard for showing under Mil.R.Evid. 803(b)(5) may be less stringent than required to satisfy Confrontation Clause). While clearly futile efforts are not required (as when the witness is dead), if there is "a possibility, albeit remote," *Roberts,* 100A S.Ct. at 2543, that the witness can be produced through reasonable efforts, the good faith element requires that those efforts be undertaken. The burden of showing that the "good faith, reasonable efforts" requirement has been satisfied lies with the prosecuting proponent. *Roberts,* 100A S.Ct. at 2543, *United States v. Ortiz,* 35 M.J. 391 (C.M.A. 1992) (American residing in Berlin was subject to subpoena by court-martial, refused to comply, but judge did not issue warrant of attachment or exercise contempt power); *United States v. Ferdinand,* 29 M.J. 164 (C.M.A. 1989), *cert. denied,* 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990) (mother reluctant to comply with subpoena to produce child victim); *Wind,* 28 M.J. at 383 (witness absent without leave); *United States v. Burns,* 27 M.J. 92, 97 (C.M.A. 1988) (mailed subpoena without tender of travel and attendance fees); *United States v. Cokely,* 22 M.J. 225, 229-30 (C.M.A. 1986) (abuse of discretion to deny continuance for such period as would have permitted witness to overcome transitory medical condition which made her unavailable); *Cordero,* 22 M.J. at 221 (not required to seek immunity for co-accused from other jurisdiction).

The circumstances in this case are of the kind that other courts have found to constitute unavailability. *Mancusi v. Stubbs,* 408 U.S. 204, 210-11, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972) (permanent resident of Sweden not available to appear at trial in Tennessee); *Casamento,* 887 F.2d at 1169 (declarant was imprisoned in Italy and Italian government would not extradite); *Kehm,* 799 F.2d at 359-61 (declarant-deponent was a Bahamian who could not be extradited and

who refused to cooperate); *Losado*, 674 F.2d at 172 (not error to admit former testimony of Columbian witness who resided in Columbia); *Creamer*, 560 F. Supp. at 498-90 (witness who could not be located was unavailable, but witness in custody of a witness protection program must at least be sought through custodians). This common theme is especially important where, as here, there is some evidence that the prosecution tried informal means anyway, though without success.

It has been significant in the civilian precedents that the federal subpoena power is not available to compel foreign persons in foreign places to come to the United States for our trials, and the military's subpoena power has no advantages that would have made any difference in Sergeant Sutton's case.[7] In military precedents, there is a special need (because of the remarkable mobility of members of our community, including the constellation of civilians who accompany it) to require that the prosecution exhaust all reasonable means to produce witnesses, *see generally United States v. Baker*, 33 M.J. 788 (A.F.C.M.R. 1991), and nonamenability to process is not enough alone,

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[7]*Cf. United States v. Hampton*, 33 M.J. 21 (C.M.A. 1991) (alien residing in United States could not be required to travel to appear in a court-martial convened in Germany); *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986), *cert. denied*, 479 U.S. 835, 107 S.Ct. 130, 93 L.Ed.2d 74 (1986) (American residing in United States could not be compelled to appear at court-martial convened in Germany); *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982) (American residing in United States could not be compelled to appear at court-martial convened in Philippines); *United States v. Burrow*, 16 U.S.C.M.A. 94, 36 C.M.R. 250, 253 (1966) (French person residing in France could not be compelled to appear at court-martial convened in France); *United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122, 135-36 (1954) (French person residing in France could not be compelled to appear at court-martial convened in France); *United States v. Hamilton*, 36 M.J. 927 (A.F.C.M.R. 1993), *pet. denied*, 38 M.J. 203 (C.M.A. 1993) (Filipino residing in Philippines could not be compelled to appear at court-martial in United States). It has been said to be possible to compel an American residing in Belgium to appear at a court-martial convened in Belgium, *United States v. Daniels*, 23 U.S.C.M.A. 94, 48 C.M.R. 655 (1974), but we are dubious of the practicality of such an effort.

United States v. Crockett, 21 M.J. 423, 427 (C.M.A. 1986). Thus, we must also evaluate the efforts to which the prosecution went and could have employed to produce the businessman. Some civilian commentators hold that the proponent must seek a deposition before the declarant can be viewed as unavailable, for a deposition is portable and might overcome the impediments to production of the witness.

"[Federal] Rule 804(a) *requires* an attempt to depose," STEPHAN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 399 (5th ed. 1990) (emphasis in original) (hereafter FEDERAL RULES OF EVIDENCE MANUAL), and the corresponding military rule is identical except for Mil.R.Evid. 804(a)(6), not applicable to this case. There are sound policy reasons for such a conclusion, and this case illustrates them. The accused can be represented at a deposition and have his right to cross-examine the witness, but the businessman's statements against Sergeant Sutton were taken by investigators alone. A deposition is a portable event that can overcome mere geography and political limitations like those in Sergeant Sutton's case, especially where, as here, the location of the declarant is known or readily knowable and the objections of a custodian to travel by the witness would likely abate if only the lawyers would go to the witness. Consistent with this civilian backdrop one also finds the military's insistence on depositions as a way of curing the omission of the government to produce a witness at the pretrial investigation required by Article 32, UCMJ, 10 U.S.C. § 832 (1988). *See United States v. Chuculate,* 5 M.J. 143 (C.M.A. 1978); *United States v. Chestnut,* 2 M.J. 84 (C.M.A. 1976). In that setting the issue is also availability, and, if anything, the stakes and rights are somewhat less stringent than they are at trial. Still, we are unable to find any military authority which requires that a party at a military trial show that it sought a deposition as part of its

predicate for later offering the absent witness's prior statement. While a deposition might have solved the problem better, admission of hearsay under Mil.R.Evid. 804(b)(3) does not become error simply because no deposition was shown to have been sought.

Finally, the trial judge's conclusion that the witness has been shown to be unavailable is reviewed on appeal only for an abuse of discretion. *United States v. Ortiz,* 35 M.J. 391, 393 (C.M.A. 1992) (former testimony at pretrial investigation offered under Mil.R.Evid. 804(b)(1)); *United States v. Hampton,* 33 M.J. 21, 23 (C.M.A. 1991) (deposition offered under Mil.R.Evid. 804(a)(5)); *United States v. Vanderwier,* 25 M.J. 263, 266 (C.M.A. 1987) (deposition offered under Mil.R.Evid. 804(b)(1)). *See generally United States v. Mokol,* 939 F.2d 436, 438 (7th Cir. 1991), *cert. denied,* ___ U.S. ___, 113 S.Ct. 284, 121 L.Ed.2d 210 (1992) (extent of trial judge's discretion on evidentiary matters). When we examine this military judge's conclusion, we find that there was information in the record from which he could conclude that the subpoena power could not compel appearance and that the prosecution had exhausted all other reasonable means to produce the civilian businessman at trial. Enough information was in the record, and enough is enough, even when, as here, it is barely enough. The military judge's conclusion that the

declarant was unavailable was not an abuse of discretion.[8] *See generally Mokol,* 939 F.2d at 438.

B. Rule 804(b)(3)

Of course, unavailability is not the end of the foundation for admission of the statements. They must also be shown to have been against the declarant's interests. "Whenever a statement against interest is offered, it is the duty of the trial judge to determine whether the declarant was under the impression that the statement was against his interest at the time he made it. The rule does not state whether a subjective or objective test is to be used. But under either test, it is necessary to examine all of the circumstances under which the statement was made and then to determine which facts were known to the declarant. These findings require the taking of considerable evidence in some cases." FEDERAL RULES OF EVIDENCE MANUAL 401-2; *see also United States v. Baran,* 22 M.J. 265, 268 (C.M.A. 1986) (Everett, C.J., concurring) (objective vs. subjective). The military test in this case is "whether the declarant himself would have perceived at the time that his statement was against his penal interests." *United States v. Greer,* 33 M.J. 426, 430 (C.M.A. 1991); *see Wind,* 28 M.J. at 384

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[8]One last aspect requires comment, and that is the mobility of a court-martial. A court-martial can sit in any place, subject only to international agreements (or the absence thereof) under which the exercise of American jurisdiction would offend the sovereignty of a host foreign government. There is no evidence in this record that the United States would have found it impolitic or impractical to return the court-martial to Honduras, the site of the crimes alleged and the place where the absent businessman was known to be. R.C.M. 906(b)(11) authorizes a motion to change the place of trial, and the accompanying discussion makes clear that such a motion may be the remedy for the inability of the court-martial to obtain compulsory process over a witness, exactly the problem in Sergeant Sutton's case. Had Sergeant Sutton made such a motion at trial, we would have reviewed the ruling for an abuse of discretion. *United States v. Bennett,* 12 M.J. 463, 466 (C.M.A. 1982). But he did not move for a change of place, and there is no error in the omission of the military judge to have ordered a change sua sponte.

("it was necessary that [declarant] perceived that doing so would be against his interests"); *United States v. Dillon,* 18 M.J. 340, 344-45 (C.M.A. 1984); *United States v. Pacheco,* 36 M.J. 530, 534 (A.F.C.M.R. 1992). "Whether a statement is a declaration against interest requires factfinding. The question . . . [is] whether a reasonable person in the position of the [declarant] had reason to fear prosecution as a result of making the statements. . . ." RULES OF EVIDENCE MANUAL 424. Thus, the trial judge's discretion depends upon the presence of adequate factfinding. However, the factfinding need not be discretely set out if it can be divined by the appellate court and then tested by the "clearly erroneous" standard. *United States v. Bagley,* 537 F.2d 162, 166-68 (5th Cir. 1976), *cert, denied,* 429 U.S. 1075, 97 S.Ct. 816, 50 L.Ed.2d 794 (1977) (by analogy to review of decisions on confessions). The essential findings were not set out in this record, *cf.* R.C.M. 905(d), so we must rely upon our own divining stick and our factfinding power under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1988).

In other, more typical cases, the motivation of a prisoner to curry favor with the authorities so detracts from the reliability of the statement that it becomes inadmissible on the theory that the requisite mental state is absent. *United States v. Magana-Olvera,* 917 F.2d 401, 407-9 (9th Cir. 1990) (statements made while witness sought and got deal with prosecution); *United States v. Palumbo,* 639 F.2d 123, 127-28 (3d Cir. 1981), *cert. denied,* 454 U.S. 819 102 S.Ct. 100, 70 L.Ed.2d 90 (1981) ("curry favor"). However, the civilian declarant in this case was not a prisoner when he gave the statements. Indeed, he was in Panama, presumably beyond the reach of the Hondurans, and he was never vulnerable to a prosecution by Americans. We can imagine that he hoped that the Americans would report his cooperativeness to the Hondurans, but there is no evidence of deal-making in the record.

Sergeant Sutton's case is different from the typical model in many respects. Most notably, the persons who heard the statements made and interrogated the businessman did not appear at trial, and there is no other information about the state of the businessman's mind except what he himself revealed in one of his statements. Fortunately, the businessman spent two typewritten, single-spaced pages in one of them detailing the way in which the focus of the Honduran investigation had come to include him. The two statements were dated 2 days apart, and it is reasonable to infer that the businessman's impression of this straits was the same on each occasion. The businessman's statement itself shows that he was in deep trouble with the government of Honduras and that he knew it. He was concerned with the possibility that his business might be closed and that he might be prosecuted, and he had lost confidence in the promises of the Honduran authorities that he would not be prosecuted. The same statement also shows that the American investigators were cooperating with the Hondurans and that the businessman knew that, too. We conclude that a reasonable person in the position of the civilian businessman, even while he was in Panama, would have had good reason to fear prosecution in Honduras if he returned there, as he did, and we also conclude that a reasonable person would have known that the statements being given to the American investigators would, if transmitted to the Hondurans, have done harm to his defense. On the other hand, his statement is like the *Wind* paradigm: "where one co-accused makes statements which acknowledge declarant's criminal liability but which make the other co-accused seem much more culpable." 28 M.J. at 384.

C. Confession of Co-Accused, Confrontation & Corroboration

As our approach to the businessman's statement shows,

considerable suspicion underlies the rules on statements against penal interest. That suspicion becomes predominant when one examines the constitutional aspects. *See generally Dill,* 24 M.J. at 387. It is now clear that an incriminating statement may not be admitted under a hearsay exception unless it also satisfies the Confrontation Clause. *See, e.g., United States v. Coachman,* 727 F.2d 1293, 1296-98 (D.C. Cir. 1984) (admission of a statement against penal interest, given by a co-accused, violated *Burton v. United States,* 391 U.S. 123, 88 S.Ct. 1620 L.Ed.2d. 476 (1968)). That requires both demonstrated unavailability and reliability. *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); FEDERAL RULES OF EVIDENCE MANUAL 36 (5th ed. 1990, supp. 1991). "Firmly rooted" exceptions to the hearsay rule are good enough by themselves, if unavailability is shown, because reliability may be inferred in those instances. *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 2542, 65 L.Ed.2d 597 (1980). But exceptions lacking that pedigree must be shown to have "particularized guarantees of trustworthiness."

"[Federal] Rule 804(b)(3) expands the common law exception for declarations against interest. Prior to the . . . Federal Rules, declarations against interest were usually limited to statements against pecuniary or proprietary interests. This Rule expands the exception to cover declarations against penal interests. . . ." FEDERAL RULES OF EVIDENCE MANUAL 401 (5th ed. 1990); *Accord Chambers v. Mississippi,* 410 U.S. 284, 298-300, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "[M]ost jurisdictions . . . limit this exception to statements against *pecuniary* interest." *United States v. Johnson,* 3 M.J. 143, 147 (C.M.A. 1977). However, the distinction was criticized, and the Court of Military Appeals has held that "we shall treat such declarations as coming within a 'well established hearsay exception.'" *Wind,* 28 M.J. at 385. *See United*

States v. York, 933 F.2d 1343, 1363 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 321, 116 L.Ed.2d 262 (1991). *Cf. Greer*, 33 M.J. at 431 n.3; *Johnson*, 3 M.J. at 146-47, *Morrison v. Duckworth*, 929 F.2d 1180, 1181 n.2 (7th Cir. 1991); *United States v. Vernor*, 902 F.2d 1182, 1186-88 (5th Cir. 1990), *cert. denied*, 498 U.S. 922, 111 S.Ct. 301, 112 L.Ed.2d 254 (1990). Thus, the businessman's declarations against has own penal interest do not require "particularized guarantees of trustworthiness"[9] under the *Idaho v. Wright* approach.

Even so, an incriminating statement made by a co-defendant after arrest is "presumptively suspect." *Lee v. Illinois*, 476 U.S. 530, 541, 106A, S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986) (joint trial); *Dill*, 24 M.J. at 387.

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[9]Indeed, some courts require that the denial of confrontation (and therefore cross-examination) be offset by some corroboration of the statement that establishes its trustworthiness. The Fifth Circuit follows this approach. *See United States v. Mock*, 640 F.2d 629 (5th Cir. 1981); *United States v. Robinson*, 635 F.2d 363 (5th Cir. 1981), *cert. denied*, 452 U.S. 916, 101 S.Ct. 3050, 69 L.Ed.2d 419 (1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981), *cert. denied*, 459 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 75 (1982); *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978). So does the Eighth Circuit. *See United States v. Rasmussen*, 790 F.2d 55 (8th Cir. 1986) (stating factors for determining the adequacy of corroboration); *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981), *cert. denied*, 459 U.S. 1111, 103 S.Ct. 742, 74 L. Ed. 2d 962 (1983). The Third Circuit also requires corroboration. *United States v. Palumbo*, 639 F.2d 123 (3d Cir. 1981), *cert. denied*, 454 U.S. 819, 102 S.Ct. 100, 70 L. Ed. 2d 90 (1981). The Seventh Circuit also requires corroboration. *United States v. Garcia*, 897 F.2d 1413 (7th Cir. 1990). The Ninth Circuit inquires carefully into reliability but has not yet held that corroborations is required. *See United States v. Holland*, 880 F.2d 1091 (9th Cir. 1989); *United States v. Candoli*, 870 F.2d 496 (9th Cir. 1989); *United States v. Patterson*, 819 F.2d 1495 (9th Cir. 1987), *cert. denied*, 474 U.S. 830, 106 S.Ct. 94, 88 L. Ed. 2d 77 (1985); *United States v. Wynn*, 767 F.2d 527 (9th Cir. 1985). The First Circuit has reserved judgment on whether corroboration is required. *United States v. Fields*, 871 F.2d 188 (1st Cir. 1989), *cert. denied*, 493 U.S. 955, 110 S.Ct. 369, 107 L. Ed. 2d 355 (1989). The Court of Military Appeals noted the value of corroboration without holding that it is required in *United States v. Koistenen*, 27 M.J. 279, 281 (C.M.A. 1988), but it has since held that no corroboration is required. *United States v. Wind*, 28 M.J. 381, 385 (C.M.A. 1989).

Indeed, the Supreme Court has called this "special suspicion." *Lee,* 106A, S.Ct. at 2062. The effect of this status of the declarant and its potential to motivate falsehoods is to deprive the hearsay exception of the benefit of its recently constructed pedigree: once it becomes "presumptively suspect," it is "necessary for the Government to show 'particularized guarantees for trustworthiness' so that 'the delcarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.'" *Greer,* 33 M.J. at 431, quoting *Idaho v. Wright,* 497 U.S. 805, ___, 110 S.Ct. 3139, 3148-49, 111 L.Ed.2d 638 (1990). One considers only the conditions of which the declarant was then aware, with no benefit of hindsight. *Greer,* 33 M.J. at 431.

One analysis, which we have followed, is demonstrated in *Johnson,* 3 M.J. 143, and in *United States v. Perner,* 14 M.J. 181, 183-84 (C.M.A. 1982) (decision about the right of a defendant to produce evidence). Several factors bearing on reliability can be gleaned from them: Whether the statement was volunteered, whether it was preceded by the *Miranda* warnings, whether the confessional parts of the statement were logical and consistent with and corroborated by the other evidence, whether there is evidence of a motive to misrepresent, whether the statement is unquestionably against one's interests, whether the statement is in handwriting and signed, whether the statement was given in the presence of impartial witnesses, whether there is any evidence of benefit from the disclosures, whether the declarant "must have been aware of his liability to criminal prosecution resulting therefrom," *Johnson,* 3 M.U. at 147-48, and whether the declarant was available at trial to renounce the statement or to be investigated by the opponent.

The civilian businessman went to great lengths to volunteer these statements, even fleeing his residence and

leaving his business behind, though likely also to avoid further trouble with the Hondurans. Though there is no indication that the investigators gave any *Miranda* warnings (or that any were required), the statements are both signed, and they are witnessed and sworn, though we cannot tell by whom or upon what authority the oath was administered. They are completely logical and consistent with the other evidence and corroborated by it in part. There is much to suggest a motive to misrepresent, but no proof at all about the declarant's mental state. However, the declarant was not available at trial to renounce the statements or to submit to interviews by the defense so that the trustworthiness of the statement might be probed. Balancing all these factors, we conclude that the reliability of these statement was adequately established. *See generally Mokol,* 939 F.2d at 438.

D. Authentication

The defense also objected to the statements as without authentication. These statements are not self-authenticating under any of the mechanisms under Mil.R.Evid. 902. Not a single person who was present when the statements were prepared testified at trial. Instead, the foundation for these statements—such as it was—was laid by the testimony of an investigator who said, in essence, they came with the investigative report the same way they usually do. The question for us is whether that is enough under Mil.R.Evid. 901. We hold that it is, though, yet once again, barely.

Not much is needed to satisfy Mil.R.Evid. 901(a). When we note Mil.R.Evid. 901(b), we notice that these statements enjoy some attributes suggested by the examples listed there. There is testimony by a person with knowledge of the general process by which such statements are customarily taken, and these statements look like the kind produced by that usual process and bear some

distinctive characteristics, principally the use of special government forms and the insistent use of initialling and of titles suggesting that the witnesses were agents of the Air Force Office of Special Investigations. Taken all together, there is enough to authenticate these statements, though barely. Reconsidering all the aspects of their admissibility, we conclude that they were properly admitted. *See generally Mokol,* 939 F.2d at 438.

III. Other Assignments

As we observed at the outset, Sergeant Sutton assigned numerous errors. Many of them can be addressed briefly, as we do now.

A. Re-enlistment and Jurisdiction

Sergeant Sutton complains that the record does not explain how jurisdiction continued to remain in the court-martial as to specification 1 of Charge III despite what appears to have been a "*Clardy-Hirschberg* gap" between two enlistments. *See United States ex rel. Hirschberg v. Cooke,* 336 U.S. 210, 69 S.Ct. 530, 93 L.Ed. 621 (1949); *United States v. Clardy,* 13 M.J. 308 (C.M.A. 1982); Article 3(a), UCMJ, 70A Stat. 36, 38 (still at 10 U.S.C. § 803(a) (1988)); R.C.M. 202(a), discussion (2)(B)(ii). The issue arose at trial, and the military judge gave the defense an opportunity to check official records. Having gotten that opportunity, defense counsel declared,

> In reviewing the personnel records [and by other means], there does not appear to be an issue of jurisdiction. However, . . . I don't believe it's in my client's best interest to waive jurisdiction by stipulating, but I will say in good faith that there does not appear

> to be an issue of jurisdiction, and, therefore, I'm not raising it.

By lucky coincidence, the prosecution introduced for another purpose a copy of an official record of Sergeant Sutton's last re-enlistment on September 16, 1987, for a term of 4 years. That term enclosed both the trial and alleged offenses—except one, specification 1 of Charge III, of which Sergeant Suton was convicted. It alleged graft from March through July 1987, a period clearly outside the enlistment recorded by the enlistment record. A court-martial of this era had no jurisdiction over offenses occurring in the accused's prior enlistments unless there was no gap between the enlistments.[10] Thus, the jurisdiction of the court-martial depended upon the absence of any gap between the September 16 re-enlistment and any prior service. *Clardy,* 13 M.J. at 316.

The government replied to this assignment by bringing the attention of the Court to the record of that re-enlistment and to the discussion by the parties at trial of the possibility that such an issue might warrant further inquiry. The government argued that the record was sufficient to show jurisdiction, absent any showing to the contrary by appellant. However, appellee's approach, sensible as it may be, overlooked the obligation of the prosecution to show the jurisdiction of a court-martial in the record. The record clearly establishes an intervening re-enlistment but did not show facts from which one might infer that the re-enlistment was not preceded by a gap in service. *See United States v. Clark,* 35 M.J. 730 (A.F.C.M.R. 1992); *United States v. Fairchild,* 33 M.J. 970 (A.F.C.M.R. 1991). We ordered the government to show

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[10]Article 3(a) was amended by the DoD Authorization Act for FY 93, 102 Pub. L. 484, 106 Stat. 2315 (1992) to eliminate the "*Hirschberg* gap" problem for 5-year offenses. *See DoD Authorization Act's Military Justice Impact,* The Reporter 12 (December 1992).

cause why the affected conviction should not be set aside. *Fairchild,* 33 M.J. at 971-72 n3. The government then moved to file copies of other enlistment documents, the motion was unopposed, and we granted it. We infer from those documents that the critical re-enlistment was a "short re-up" which left no-gap in service affecting jurisdiction. No relief is warranted.

B. No *Kastigar* Hearing

Sergeant Sutton was granted immunity and interrogated by government investigators, and his testimony was used against one of his co-actors, all before his own case came to trial. He now predictably assigns the compulsion as error, and, more specifically, he complains of the failure of the military judge to hold a "*Kastigar* hearing" to assure that none of the immunized and compelled information came was used against him. *See Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *United States v. North,* 910 F.2d 843 (D.C. Cir. 1990), *reh'g,* 920 F.2d 940 (1990). However, Sergeant Sutton did not raise this complaint at trial, and it is now waived. *United States v. Lucas,* 19 M.J. 773 (A.F.C.M.R. 1984), *aff'd,* 25 M.J. 19 (C.M.A. 1987), *cert denied,* 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 764 (1988).

C. Effectiveness of Counsel

Sergeant Sutton also adds what has become a routine but routinely unpersuasive assignment, namely that his lawyer was ineffective. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) *reh'g denied,* 467 U.S. 1267 (1984); *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987); *United States v. Barnard,* 32 M.J. 530 (A.F.C.M.R. 1990), *pet denied,* 33 M.J. 484 (C.M.A. 1991). He names several tactical decisions by his lawyer that he contests now, principally the decision not to insist

upon a "*Kastigar* hearing." His lawyer replied in the now customary affidavit, filed upon the government's motion on appeal. It provides the "reasoned basis" for which we reluctantly examined tactical decisions by the lawyer at trial. *United States v. Mansfield,* 24 M.J. 611 (A.F.C.M.R. 1987); *United States v. Garries,* 19 M.J. 845, 862-65 (A.F.C.M.R. 1984), *aff'd,* 22 M.J. 288 (C.M.A. 1986), *cert. denied,* 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986). Sergeant Sutton has the burden of establishing actual prejudice, that the result *would have been* different but for the decisions of his lawyer at trial, that the lawyer's ineffectiveness deprives one of confidence in the fairness and accuracy of the result at trial. Like most appellants who raise this almost mimeographed issue, Sergeant Sutton has failed to meet that burden, too. He is entitled to no relief.

D. Instruction on Veterans Benefits

Sergeant Sutton also complains that the military trial judge's instruction on the "vesting" of veterans benefits was inaccurate. That issue was resolved during the pendency of his appeal in *United States v. Longhi,* 36 M.J. 988 (A.F.C.M.R. 1993), and *United States v. Hansen,* 36 M.J. 599, 611-12 (A.F.C.M.R. 1992), *pet. denied,* 38 M.J. 229 (C.M.A. 1993) (use of "vested" not prejudicial in instruction on effects of punitive discharge on veterans' benefits). He is entitled to no relief.

E. Appropriateness of the Sentence

Sergeant Sutton complains of the severity of the sentence that was adjudged and approved: a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to E-1, a fine of $84,742.00, and further confinement for 5 years contingent upon failure to pay the fine. His thrust is that confinement may not be

adjudged as contingent upon failure to pay a fine, but we do not address that aspect.[11] We have considered the sentence carefully. It is not inappropriate.

F. Fixed Terms

Sergeant Sutton also complains that military trial and appellate judges lack tenure in the sense that they do not serve for fixed terms. During the pendency of his appeal, that issue was resolved in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), *cert. granted sub nom. Weiss v. United States*, ___) U.S. ___, 113 S.Ct. 2412, 124 L.Ed.2d 635 (1993). There is no military right to have a case heard before tenured judges. He is entitled to no relief.

We find the remaining assignments of error to be without merit for the reasons stated in the reply brief of the government. The evidence to support the findings is legally and factually sufficient. Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are correct in law and fact, and they are

AFFIRMED.

Senior Judges LEONARD and JOHNSON (who participated in this decision before their departure from the court) concur.

OFFICIAL

NAOMI D. WILLIAMS
Technical Sergeant, USAF
Chief Court Administrator,
AFCMR

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[11]Sergeant Sutton renews this same argument in different form by arguing that R.C.M. 1113(d)(3), which provides for execution of "contingent confinement," is unconstitutional. We do not address this argument because nothing suggests that the contingent confinement has been executed. The issue is not yet ripe for adjudication. *See United States v. Anderson*, 36 M.J. 963, 967 (A.F.C.M.R. 1993) (mootness).

APPENDIX C

Chg	*Art UCMJ*	*Spec*	*Summary of Offense*	*Plea*	*Finding*
I	81			NG	G
		1	Conspiracy w/SSgt Ellis to violate SOUTHCOM Reg 1-20 by wrongfully exchanging US currency at an unauthorized exchange activity sometime btwn 9 Oct 88 to 5 Feb 89.	NG	G
		2	Conspiracy w/SSgt Wedley to violate SOUTHCOM Reg 1-20 by wrongfully exchanging US currency at an unauthorized exchange activity sometime btwn 9 Oct 88 to 5 Feb 89.	NG	G
		3	Conspiracy w/SSgt English to violate SOUTHCOM Reg 1-20 by wrongfully exchanging US currency at an unauthorized exchange activity sometime btwn 9 Oct 88 to 5 Feb 89.	NG	G
		4	Conspiracy w/SSgt Steele to violate SOUTHCOM Reg 1-20 by wrongfully posessing US currency sometime btwn 9 Oct 88 and 5 Feb 89.	NG	G

II	92			NG	G
		1	Violated a lawful gen'l regulation (SCR 1-20) by unauthorized possession and exchange of currency on divers occasions btwn 23 Mar 87 and 19 Jul 87.	NG	NG
		2	Violated a lawful gen'l regulation (SCR 1-20) by unauthorized possession and exchange of currency on divers occasions btwn 9 Oct 88 and 5 Feb 89.	NG	G
		3	Violated a lawful gen'l regulation (AFR 30-30) by receiving packages through military post office for, and delivering packages by government vehicle to, an unauthorized person and receiving compensation (50 Lempira) for those services on divers occasions btwn 23 Mar 87 and 9 Jul 87.	NG	NG

		4	Violated a lawful gen'l regulation (AFR 30-30) by receiving packages through military post office for, and delivering packages by government vehicle to, an unauthorized person and receiving compensation (50 Lempira) for those services on divers occasions btwn 9 Oct 88 and 5 Feb 89.	NG	G
III	134			NG	G
		1	Graft, i.e. receiving money for services rendered in conjunction w/official duties (delivery of mail), on divers occasions btwn 23 Mar 87 and 9 Jul 87.	NG	G
		2	Graft, i.e. receiving money for services rendered in conjunction w/official duties (delivery of mail), on divers occasions btwn 9 Oct 88 and 5 Feb 89.	NG	G
		3	Solicitation of SSgt Steele sometime btwn 9 Oct 88 and 5 Feb 89 to violate SOUTHCOM Reg 1-20 by wrongfully exchanging US currency.	NG	Wd after-arraign-ment

4	Solictation of SSgt Steele sometime btwn 9 Oct 88 and 5 Feb 89 to disobey AFR 30-30 by misusing postal facilities and a government vehicle.	NG	G